Southwestern Portland Cement Company *and* Local Lodge D–357, Cement, Lime, Gypsum and Allied Workers, Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Case 9–CA–26797

June 24, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On May 2, 1990, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Southwestern Portland Cement Company, Fairborn, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

The Respondent has also excepted to some of the judges's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Eric Taylor, Esq.,, for the General Counsel
John J. Heron and *William H. Delaney, Esqs.*, of Dayton, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on an original charge filed September 5, 1989, and an amended charge filed October 26, 1989, by Local Lodge D–357, Cement, Lime, Gypsum and Allied Workers, Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO (Union), the Regional Director for Region 9 issued a complaint and notice of hearing dated October 31, 1989. The complaint alleges that Southwestern Portland Cement Company (Company or Respondent) unilaterally instituted a revised absentee and tardiness policy without affording the Union an opportunity to bargain, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). Respondent admits all the factual allegations of the complaint while denying that it has violated the Act.

A hearing was held in this matter in Dayton, Ohio, on January 30, 1990. Briefs were received from the parties on or about March 12, 1990. Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Fairborn, Ohio, where it has been engaged in the manufacture, distribution and sale of cement and related products. Respondent has admitted the jurisdictional allegations of the complaint and I find that it is now, and has been at all times material to this proceeding, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It was stipulated and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue Presented by the Complaint*

Respondent is engaged in the production of cement with a plant in Fairborn, Ohio. Since 1956, the Union has represented a unit of Respondent's employees at the facility and the parties have entered into a number of collective-bargaining agreements.[1] By a memorandum dated April 19, 1989, Respondent announced a revised absentee and tardiness policy (A and T policy) which was made effective May 1. The Union contends that the A and T policy is a mandatory subject of bargaining and Respondent's refusal to bargain in good faith over its provisions is in violation of the Act. Respondent contends that by agreeing to the management-rights and past practice clauses of the most recent collective-bargaining agreement, the Union had waived its right to bargain over the May and subsequent changes in the involved policy.

Thus the issue presented for determination is whether Respondent violated Section 8(a)(1) and (5) of the Act by its failure and refusal to bargain with the Union when it unilaterally implemented a revised A and T policy on May 1, 1989. Determination of this question will also require a determination of whether the Union waived its right to bargain over the A and T policy.

B. *Historical Development of the A and T Policy, Past Practices and Management-Rights Clauses*

l. Events occurring through 1985

The focal point of the instant matter is the parties' A and T policy, and the management-rights clause and past practice clause, which clauses are contained in the most recent collec-

[1] The following employees of Respondent constitute the unit:
All production and maintenance employees at [Respondent's] plant and quarries located at Fairborn, Ohio, but excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

tive-bargaining agreement. The A and T policy was first negotiated as an issue separate and distinct from the collective-bargaining agreement in November 1979. It remained a separate entity for the duration of the parties' 1981–1984 collective-bargaining agreement. However, during the latter half of 1985, the parties' collective-bargaining negotiations broke down and Respondent implemented its last proposals on September 1, 1985. For the first time the A and T policy was attached to the body of the other terms which would have constituted the bases of a collective-bargaining agreement had the parties been able to conclude an agreement. A more detailed history of the A and T policy and the other involved clauses follows.

In 1978, Respondent and the Union entered into a 3-year collective-bargaining agreement, which included a management-rights clause that stated:

> The Union recognizes that the management of the plant, the direction of the working forces, including the right to hire, discipline for just cause, promote, or transfer employees; the right to transfer and relieve employees from duty because of lack of work or other legitimate reason, and the right to establish and change the working schedules and duties of employees are vested in the Company, except as otherwise provided in the Agreement. If the Company in the exercise of any of the above rights violates the Agreement, any employee aggrieved by such action may resort to the grievance procedure.

On November 16, 1979, Respondent placed into effect a ''no-fault'' A and T policy, the terms of which provided for Respondent's progressive response to employee absence and tardiness. The 1979 A and T policy contained no redemptive provision whereby an employee could receive ''credit'' for use in offsetting disciplinary action on account of tardiness or absences.

The language of the A and T policy was subsequently modified in a Letter of Understanding appended to the 1981–1984 collective-bargaining agreement between the parties. In the Letter of Understanding, the parties added ''credit points'' to the A and T policy as a way for employees to offset points received under the disciplinary section of the policy. The language stated:

> Any employee who does not receive any point accumulation over a six month period of time will receive one credit point. A credit point is defined as a point or points used to offset any point received under the Company's A and T policy. No more than three credit points can be accumulated.

The management provision in the 1981–1984 collective-bargaining agreement remained identical to the language contained in the previous agreement.

Prior to the April 30, 1984 agreement expiration date, Respondent and the Union entered into negotiations for a successor agreement. When negotiations reached impasse, Respondent implemented its final proposal on September 1, 1985. The Union filed charges with the Board and, in Cases 9–CA–22509 and 9–CA–22942, Judge Robert Leiner concluded that an impasse existed and the Company's implementation was lawful. The Board upheld this decision over the Union's exceptions. As part of its implemented terms and conditions of employment, Respondent added the following language to the management article:

> The listing of specific rights in this Agreement is not intended to be nor shall be considered restrictive of or a waiver of any of the rights of management not listed and not specifically surrendered herein, whether or not such rights have been exercised by the Company in the past.

Moreover, the Company included a ''curtailment of past practices'' clause in the implemented terms and conditions which stated:

> All previous side letters, ad hoc agreements and informal understandings or past practices are hereby revoked, withdrawn and canceled and none shall survive the execution of this contract and no provision shall have any force or effect whatsoever either as past practice, special written agreement, oral agreement, informal understanding or otherwise unless expressly contained herein.

At the same time, Respondent lawfully implemented changes in the A and T policy which contained a more abbreviated discharge procedure for less (3 versus 5) total absences. Additionally, employees accumulated credit points over a longer period of time. The credit language stated:

> Any employee who does not receive any point accumulation over a twelve (12) working month period of time will receive one (1) credit point. A credit point is defined as a point or points used to offset any point received under the Company's A and T policy. No more than three (3) credit points can be accumulated.

The implemented A and T policy further required that the written disciplinary letters issued to employees for violation of the policy remain in the employee's personnel file for 12 working months. Ted Stute, Respondent's plant manager, testified that Respondent disciplined and counseled employees pursuant to the implemented A and T policy. Additionally, employees grieved company action taken pursuant to the policy in accordance with the implemented grievance procedure. Respondent continued to administer the terms and conditions of the 1985 implemented A and T policy until changing it on May 1, 1989.

2. Post-1985 events leading to implementation of the revised A and T policy on May 1

After the expiration of the 1984 collective-bargaining agreement and the Respondent's implementation of its final offer after impasse, the parties waited until Judge Leiner's decision issued in June 1987 before resuming negotiations for a new agreement. In the negotiations which followed, the Union was represented, as pertinent, by its president, John Everetts, Jr., its vice president, Dave Gullett, its recording secretary, Frank Deaton, and the International Union's representative, August Clavier. The Company was represented by its Plant Manager Ted Stute, its division director, industrial relations, Gary Leasure, and its director of labor relations, Ronald O'Malley. Joseph Weil replaced Leasure in

November 1988. On June 18, 1987, the parties engaged in a get-acquainted session and did not specifically address particular changes to Respondent's implemented terms and conditions of employment.

On June 19, the parties again met and the Union identified the implemented A and T policy as a problem area in negotiations. To avoid the problem, Respondent and the Union agreed that the A and T policy should be removed from the table and negotiated locally as a matter separate from the contract. At the hearing, Respondent's witnesses attempted to deny that the word ''negotiated'' was ever mentioned with respect to the A & T policy; rather, they testified that they always said the policy would be ''handled'' or ''dealt with'' locally. I do not accept this testimony as credible. I credit the testimony of Union Local President Everetts that it was agreed that the matter of the A and T policy was to be ''negotiated'' locally. To make any other finding flies in the face of reason. The topic of the A and T policy was on the bargaining table in June 1987, and had been a subject of bargaining between the parties for several years at that point. If it was Respondent's intention in June 1987 to cease bargaining over this issue, such a position would have been a violation of the Act without the Union's acquiescence. The clear implication of the parties agreement to deal separately with the issue of the A and T policy was that a separate agreement would be reached on this issue, like the Letter of Understanding that was appended to the 1981–1984 contract, and that the issue would not then be a roadblock to agreement on the collective-bargaining agreement.

The matter of the A and T policy was next discussed at a grievance meeting held between the parties on June 24, 1987. At this meeting the Union presented Respondent with its A and T proposal.[2] The Union's proposal contained less restrictive language than the current implemented policy and also contained personal absence (PA) day provisions. Respondent took the Union's proposal under advisement. At a grievance meeting held August 12, 1987, the Company presented the Union with its counterproposal to the Union's proposal of June 24. The minutes of this meeting contain highlights of the counterproposal that state:

> The major changes included changing the first written warning being issued upon a third point basis to a five point basis. With regards to tardiness the Company moved from 1 hour to over 2 hours for a full point. In addition, the Company added an extenuating circumstances clause under Paragraph 5(k) as well as provide up to four credit points, one per quarter, under Paragraph 10. . . . The Company stated it would suggest placing this into effect on October 1, 1987, to keep the policy on a quarterly basis (calendar).

The Union agreed to analyze the counterproposal and address it at a later date. In a negotiating session held October 7, 1987, the Union informally proposed that it might accept the Company's A and T policy counterproposal language if 1-day vacations were reintroduced into the vacation article of the Company's vacation language proposal in the contract negotiations. Respondent restated that the agreement between the parties was that the A and T policy was removed from contract negotiations. However, the parties' actions in making proposals and counterproposals with respect to the A and T policy demonstrates that they not only contemplated bargaining over this issue, but engaged in bargaining over it.

At an October 8, 1987 bargaining session, the Company, in response to a question of interpretation of the application of the proposed past practices article, the Company's position was that ''if it's [past practice] not between the covers of the contract then [dispute] doesn't exist.'' The Company continued to press the Union for a response to its A and T policy proposal. At meetings held November 12 and 13, 1987, the Union responded, stating that the union bargaining committee was reluctant to negotiate the A and T policy until the issue of 1-day vacations had been settled in the main agreement.

On or about December 14, 1987, the Union produced a complete proposal representing the Union's position on all contract issues. There was no proposal about the A and T policy. This is perfectly logical as both parties had previously agreed that the matter of the A and T policy would be negotiated separately from the main contract. On January 7, 1988, the parties met and the Union agreed to the 1985 implemented management rights article. However, the Union proposed past practice language as follows:

> All existing past practices which have not been negotiated away shall continue in full force and effect.

The Company reiterated its position on this matter, to wit, that if the past practice does not exist in the contract, it does not exist.

No further bargaining sessions were held until after the Board's decision upholding Judge Leiner's earlier decision issued in July 1988. The sessions resumed on October 19 of that year with the Company submitting several new proposals and stating that items not newly proposed would remain unchanged from the Company's last position. The Company proposed new management language which stated:

> The Union recognizes that the management of the plant, the direction of the working forces, including the right to hire, discipline for just cause, *the right to make and change and enforce [after posting] rules for the maintenance of discipline and safety*; the exclusive right to determine partial or permanent discontinuance or shutdown of operations [the Company's only obligation when exercising this right is to bargain with the Union over the effects of that decision], promote, or transfer employees; the right to transfer and relieve employees from duty because of lack of work or other legitimate reason, and the right to establish and change the working schedules and duties of employees are vested in the Company, except as otherwise provided in the Agreement. The listing of specific rights in this Agreement is not intended to be nor shall be considered restrictive of or a waiver of any of the rights of management not listed and not specifically surrendered herein, whether or not such rights have been exercised by the Company in the past. [Emphasis added.]

[2] On brief, Respondent seems to contend that because the matter of the A and T policy was addressed locally in the course of grievance meetings, as opposed to formal bargaining sessions, no ''bargaining'' took place. I do not find that this argument has merit. It appears to me that a grievance meeting would be a convenient forum to bargain over the A and T policy as all necessary local participants would be present. Further, it is clear from the evidence that actual bargaining did take place at these meetings.

Company Representative R. O'Malley testified that he explained the language of the management clause to the union bargaining committee as follows:

> Q. Okay. Was there a discussion about article four as you presented it?
>
> A. Yes. In some detail.
>
> A. Henry Bechtholdt was the chief spokesman for the union on that date and he asked how this would be applied, how it would be administered. I told him that we would have the right to establish, change, make rules and—during the life of the agreement. He asked if we would negotiate them with the union. He was informed no. We would alert the union. We would inform them but we would not negotiate and that was solely our reserve for management.

The Union's minutes of this meeting state on this point:

> Art. 4 O'M [O'Malley]—Co. wants this change beginning in 3rd line [at start] [unintelligible] fifth line up from botto [sic] . . . .
>
> O'M to Bechtholdt—[concerning line 3 & 4] its our intent to change rules as necessary but we will notify Union but Union will not be able to bargain on the change. That is a management right.

The parties did not reach agreement on the new language on this date or at the next meeting the following day. At the meeting held on October 21, 1988, the parties restated their understanding that the A and T policy was to be discussed at the local level. Respondent's minutes of that meeting reflect that O'Malley stated that the Company had submitted a new A and T policy proposal about 1-1/2 years before, after it had been removed from the bargaining table, with no response from the Union. Stute stated that the local committee had advised that they were not going to respond until there was some indication as to the outcome of negotiations. Stute also indicated that the Company wanted to look at it again also. I find that this passage is totally inconsistent with the position that the management clause proposed just 2 days earlier would empower the Company to change the policy unilaterally without bargaining with the Union. It strongly indicates to me that the Company did not consider the A and T policy to be encompassed within the management clause and intended to negotiate its terms on the local level.

Nothing significant next occurred until the March 1989 negotiations. On March 1, the parties briefly caucused and then reviewed the status of outstanding contract items. At that time, article 4–management and article 28–past practices were outstanding proposals yet to be agreed upon. Later in the day, Respondent proposed changes in its position regarding the grandfathering of existing vacation benefits for current employees. Then the Union caucused overnight to examine the Company's proposal.

On March 2, the Union responded to Respondent's March 1 proposal. The Union stated that its position on the management and past practice items remained open. That afternoon, the Union made an economic proposal to the Company on wages, insurance, and pensions. After the presentation of its economic proposal, the Union indicated that the economic proposal combined with the noneconomic language proposal made earlier in the day represented the Union's complete proposal. After a brief caucus, the parties continued negotiating, but with no further discussion of the involved contract articles or the A and T policy.

On March 3, the parties reconvened and the Union requested further clarification of the Company's March 1st proposal ''grandfathering'' existing vacation time off for present employees. After clarifying the Company's proposal, the Company urged the Union to consider the Respondent's proposals on a number of items, and the Union caucused. On returning from their caucus, the Union stated that to reach agreement, the Union required a union-security clause, a dues-checkoff provision, and an arbitration provision. The Company caucused and on returning to the table, presented a new proposal on dues-checkoff language and presented its own economic proposal. After further negotiation, the Company proposed an arbitration provision and the Union stated that it would recommend the company package to its membership for ratification.

O'Malley reviewed the proposed articles 1–29 and asked the Union if it accepted the articles based on the language of the last company proposal. Clavier accepted the Company's position on all items on behalf of the Union. Next, O'Malley discussed the A and T policy and restated that it was not part of the contract negotiations and that it would be dealt with locally. The Union responded that it would be dealt with as soon as possible. Again, nothing was said by the Company to indicate that the matter was not a subject for local negotiation as the power to change the policy unilaterally was encompassed within the management clause. I find this especially significant as the Union had just tentatively agreed to, inter alia, the management article. The Company asked for the weekend to assemble the contract language. The parties agreed to reconvene on March 7 to review the tentative contract.

On March 7, the parties reconvened, with Everetts stating for the Union that we ''have a proposal and counter proposal on the table for the A and T Policy and [should] get it out of the way first.'' Then, Weil inquired as to why the Union desired to exchange proposals on the policy instead of waiting for the Company to implement a new policy and then grieving it through the contractual procedure. At that point, Stute testified that he told the Union that the A and T policy was not part of the negotiated agreement and the Company did not have to negotiate it. Everetts testified that Stute said merely that the Company had agreed to take it [the A and T policy] off the contract negotiating table and handle it locally and the Company was prepared to do that. I credit Everetts' version of the Stute remark. All of the other witnesses and the minutes of the meeting indicate that the first time that Respondent announced its intention not to negotiate the A and T policy occurred on March 8.

On March 8, the parties continued to review the proposed contract language. After reviewing the management language, Weil stated that the Company's interpretation of the new language was as follows:

> When we got to the management and prerogatives clause I commented that one of the changes in there was the fact that the company had the right now to make and—make rules and change rules without—by merely posting them, which meant that the Union gave up its right to negotiate them.

Later, during the review of the past practice language, Everetts expressed concern regarding the Company's position on the A and T policy. Weil stated that it was the Company's intent to place a new A and T policy into effect by May 1, one that would address the accumulation of credits. The Respondent's typewritten notes on this subject state:

> The Union stated that the Corporate Labor Relations Representative [O'Malley] for the Company had said that the Company and the Union would settle the A and T policy locally. They then asked the Company whether they were willing to negotiate it. The Company responded that they would not negotiate the A and T policy with the Union. The Union then commented that the Company's refusal to negotiate the A and T policy would hang-up the ratification vote of the contract. The Company responded that the Union had been aware of Company's language proposal in Article 4.

Stute and Weil both testified about the foregoing in a manner similar to the minutes. Stute's handwritten notes of the meeting do not mention that article 4 was discussed in relation to Respondent's newly stated refusal to bargain over the A and T policy.

Everetts testified that there was no mention of the management clause in relation to the announced refusal to bargain and the Union's handwritten notes make no mention of article 4 being given as the reason for the refusal. The Union's notes of the March 8 meeting indicate that the Company announced that it was its intent to effect changes in the A and T policy by May 1, and that it would not negotiate over the A and T policy. The Union objected to the refusal to negotiate stating that O'Malley had said the A and T policy would be negotiated locally. Weil and Stute indicated that they had not heard O'Malley make that statement. Weil telephoned O'Malley and reported O'Malley did not make this statement. Stute then said that the A and T policy had to be in place because of the workers who do not want to come to work. The Company was looking at putting in a bonus concept in the A and T policy to reward those who do not miss work. The parties then argued over whether the Company had previously agreed to negotiate the policy. The Union caucused and on return requested bargaining over the A and T policy. The Company refused this request. Everetts testified further that Stute and Weil said that they would check with O'Malley and read their minutes and get back with the Union.

If article 4 was given by Respondent's officials as the reason for their refusing to negotiate over the A and T policy on March 8, I find that it was not so understood by the Union. Had this position have clearly been made known, there would certainly have been some argument or extended discussion about it. The notes of the meeting indicate that there was no discussion on this point. Respondent's typewritten notes of the bargaining sessions are an after-the-fact complilation of the rememberances of the management officials in attendance. As such, I believe they are not as reliable as the Union's contemporaneous handwritten notes or Stute's handwritten notes, neither of which has any mention of article 4 being given as the reason for Respondent's refusal to bargain.

The union membership ratified the proposed contract on March 11. Everetts testified that the terms of the agreement were fully discussed with the membership prior to the ratification vote. With respect to the A and T policy, he informed the membership that the Company was taking the position that it was not going to negotiate the A and T policy. Everetts testified that he told the membership that the Company's representatives stated that they would check with O'Malley and check their negotiating minutes and get back to the Union on the subject of further negotiations on the policy.

On March 23, the parties executed the new collective-bargaining agreement. On April 19, Weil posted the revised A and T Policy to take effect on May 1. In the posting memorandum, the policy changes were outlined as follows:

> The existing Section 11 will be amended as follows:
>
> Any employee who does not receive any point accumulation for the previous quarter will receive one (1) credit point. The quarters are January through March, April through June, July through September and October through December.
>
> A credit point is defined as a point or points used to offset any future point received under the Company's A and T Policy. No more than four (4) credit points can be accumulated. The use of a credit point will not affect earning future points.''

Weil testified that the only difference in the May 1, 1989 policy and previously implemented policy was the definition of calendar quarters.

C. *Discussion of Legal Issues Presented*

It is undisputed that work rules and related disciplinary procedures are mandatory subjects of bargaining. It is undisputed that the Union at all material times requested to bargain over the A and T policy. The duty to bargain continues during the existence of a bargaining agreement concerning any mandatory subject of bargaining which has not been specifically covered in the contract and regarding which the union has not clearly and unmistakably waived its right to bargain. *Rockwell International Corp.*, 260 NLRB 1346 (1982), citing *NL Industries*, 220 NLRB 41 (1975). However, the Respondent contends that the Union clearly and unmistakably waived its right to bargain over the Respondent's A and T policy after executing the 1989-1991 collective-bargaining agreement between the parties. The Respondent's argument is based on the management-rights clause contained in article 4 of the collective-bargaining agreement, and specifically the newly added language therein, which states:

> the right to make and change and enforce (after posting) rules for the maintenance of discipline and safety . . . .

In its argument, The Respondent relies primarily on the Board's holding in *United Technologies Corp.*, 287 NLRB 198 (1987). In that case, The Board reversed the administrative law judge's finding that the employer unlawfully unilaterally altered its progressive discipline procedures for absenteeism where the employer had in effect collective-bargaining language which stated:

> [T]he Respondent has ''the sole right and responsibility to direct the operations of the company and in this connection . . . to select, hire, and demote employees, *including the right to make* and apply rules and regulations for production, *discipline*, efficiency, and safety.'' [Emphasis added.]

In reversing the Judge's decision, the Board stated:

> [T]he contract language plainly grants the Respondent the right to unilaterally make and apply rules for discipline. The fact that the Respondent's action at issue here was characterized as changing a rule rather than making a rule is merely a semantical difference. The Respondent's action could be as readily viewed as rescinding its rule on discipline for absenteeism and making a new rule on the same subject. Additionally, we have examined the evidence of the parties' bargaining history concerning the management functions clause, and we can discern from history no indication that the contract language in issue here was intended to mean something other than that which it plainly states. Thus, the Respondent's action falls within the scope of management functions provision. Accordingly, we hold that by agreeing to the management functions provisions, the Union waived its right to bargain over the Respondent's progressive discipline procedure. [Footnote omitted.]
>
> Our conclusion is not altered by the fact that 5 or 6 years prior to changing its progressive discipline policy for absenteeism, the Respondent had attempted to change unilaterally certain other rules but subsequently agreed to bargain over the changes as part of a settlement of unfair labor practice charges. Parties can have many different reasons for agreeing to settle unfair labor practice charges and many different reasons for agreeing on some occasions to forego exercising rights that are clearly theirs under a collective-bargaining agreement. The single, temporally distant incident on which our dissenting colleague relies as casting doubt on the meaning of the management functions clause with respect to disciplinary rules simply cannot bear the weight he assigns it.[5]

[5] Unlike the evidence that the court of appeals in *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027 (D.C. Cir. 1986), characterized as possibly indicating an intent inconsistent with the language of the contractual provision at issue there, the incident on which our colleague relies lacks any linkage to the parties' negotiations over the clause. This is not to say that evidence of the way in which a clause is applied is not relevant to its meaning. One may, however, concede that such evidence is relevant without accepting the proposition that an express contractual waiver of a union's negotiating rights over a specific subject becomes a nullity if the employer fails to exercise its right to act unilaterally under the clause on every possible occasion.

I find the instant case very different from *United Technologies*, supra. Here, there was a consistent, not isolated or temporally distant, past history of bargaining over the A and T policy, a history which was not shown to exist with other plant rules for discipline and safety. In the negotiations which led up to the most recent contract, I have found from the evidence that the parties agreed to bargain separately over the issue of the A and T policy, and actually engaged in bargaining over that issue. At no time until after the union bargaining committee agreed to favorably submit the collective-bargaining agreement for ratification did Respondent assert that the management-rights clause in any way applied to the A and T policy. Had Respondent intended for the management clause to so apply, it had ample opportunity to make this position known during negotiations. For example, when it introduced the management language in bargaining sessions in October 1988, it did not state that it would encompass the A and T policy, though the matter of the negotiations over that policy were also mentioned during these sessions. At every point in the record where Respondent's witnesses recalled explaining to the union bargaining committee the purpose of broadening the management clause, they stated that it was to facilitate changes in the Company's plant disciplinary and safety rules. The matter of the A and T policy, which had historically been treated as a separate matter, was pointedly not mentioned in this context.

Further, because Respondent consistently agreed to negotiate the A and T policy separately and apart from the contract, I believe that it is estopped from changing its position on that subject after the union bargaining committee agreed to the terms of the collective-bargaining agreement on March 3. As of that date, the Company had made a complete contract proposal, with a side agreement to negotiate the A and T policy locally, and the union committee had accepted the offer. All that remained was reducing the agreement to a final written form and gaining ratification from the union membership. At this point, I believe the Company was powerless to change the terms of its agreement until the Union had a reasonable time to achieve ratification.

Moreover, if either of the parties relied to its detriment on the agreement to bargain separately over the A and T policy, it was the Union. Although the Respondent argues it gave up valuable consideration for union approval of the management-rights clause, the matter of A and T policy negotiations was never a bargaining chip. The Company made this clear when it refused to tie a union proposal on vacations during bargaining on the collective-bargaining agreement to the successful negotiation of the A and T policy. It simply stated that the involved policy was to be negotiated separately. Had the Union known during negotiations that it was giving up its right to negotiate the A and T policy when it approved the management-rights clause, it would have had a valuable bargaining chip. It did not know this because Respondent, by continuously agreeing to bargain separately over the policy, clearly implied that the policy was not intended to be covered by the management-rights clause.

At the point in time when there was a meeting of the minds on the subject of the collective-bargaining agreement, March 3, based on all the evidence surrounding the negotiations, it can only be found that the parties did not intend for the A and T policy to be encompassed within the management clause. By asserting thereafter that the policy was so encompassed, Respondent was offering an interpretation of article 4 with which the Union could honestly disagree. That it disagreed with this interpretation is evidenced by its continued request to bargain over the A and T policy, as the parties had agreed. As I have found earlier, the Union was not aware that management was relying on the management clause as justification for its refusal to bargain. However, even if the Union had been made aware of this position,

under the circumstances, I believe the Union was justified in ratifying the contract and pursuing its interpretation of the parties' agreement before the Board. I further find that by pursuing this line of action, the Union did not waive its right to bargain over the A and T policy.

Although it does not so contend on brief, at the hearing Respondent indicated that by agreeing to articles 28 and 29 of the collective-bargaining agreement,[3] the Union had waived its right to bargain over the A and T policy. These clauses, though broad in nature, do not establish a clear and unequivocal waiver of the Union's right to engage in bargaining over the A and T policy. See *Rockwell International Corp.*, supra. Where an employer is relying on zipper clauses, such as those herein, to enable it to make unilateral changes, or to institute new terms and conditions of employment not contained in the agreement the record must disclose that the particular matter in issue was fully discussed or consciously explored in negotiations, and that the Union consciously yielded, or clearly and unmistakably waived its interest in the matter. *Angelus Block Co.*, 250 NLRB 868 (1980); *Rockwell International Corp.*, supra.

In the instant matter, the record is nearly devoid of any reference to the A and T policy in connection with either of the two involved clauses during the course of negotiations. In fact, when Union Vice President Dave Gullett contended, after Respondent's refusal to negotiate the A and T policy, the A and T policy no longer existed because of the past practice clause, Respondent's officials asserted that the past practice clause does not apply to the A and T policy. In any event, for all the reasons that I found that by agreeing to article 4, the Union did not waive its bargaining rights over the A and T policy, I find that it did not waive such rights by agreeing to articles 28 and 29 of the current collective-bargaining agreement.

For all the reasons set forth above, I find that the Union has not waived its right to bargain over the Respondent's A and T policy, and thus, by failing and refusing to bargain over the A and T policy and by unilaterally changing its terms on May 1, 1989, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Southwestern Portland Cement Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Lodge D–357, Cement, Lime, Gypsum and Allied Workers, Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at [Respondent's] plant and quarries located at Fairborn, Ohio, but excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

4. At all material times, the above named labor organization has been and is now the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally implementing on May 1, 1989, certain changes in its absentee and tardiness policy without having afforded the Union an opportunity to negotiate and bargain with respect to such changes, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By this conduct, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them by Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action which is necessary to effectuate the policies of the Act.

As the Respondent unlawfully implemented unilateral changes in its absentee and tardiness policy on May 1, 1989, without having first afforded the Union an opportunity to bargain over such changes, it is recommended that Respondent be ordered to rescind such unilateral changes, and upon request of the Union, bargain in good faith over the terms and conditions of the absentee and tardiness policy. The policy as it existed prior to May 1, 1989, was lawfully implemented and remains in force.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Southwestern Portland Cement Company, Fairborn, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[3] Art. 28—Scope of Agreement, reads as follows:

> This Labor Agreement, Group Insurance Plan, Pension Plan, and Supplemental Unemployment Benefit Plan together contain all the obligations of and restrictions imposed upon each of the parties during their respective terms. It is the intent of the parties to have settled all issues between them and all collective bargaining obligations for the term of the Labor Agreement, and that no change shall be made in the Agreement prior to the expiration thereof except by mutual written consent. The Group Insurance Plan, Pension Plan, and SUB Plan may be changed from time to time by the Company as required by law.''

Art. 29—Past Practice, reads as follows:

> All previous side letters, ad hoc agreements and informal understandings or past practices are hereby revoked, withdrawn and canceled and none shall survive the execution of this contract and no provision shall have any force or effect whatsoever either as past practice, special written agreement, oral agreement, informal understanding or otherwise unless expressly contained herein.

[4] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Unilaterally implementing changes in its absentee and tardiness policy without first affording the Union an opportunity to bargain in good faith over such proposed changes as the exclusive bargaining representative of its employees in the following appropriate unit.

> All production and maintenance employees at [Respondent's] plant and quarries located at Fairborn, Ohio, but excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral changes made in its absentee and tardiness policy on May 1, 1989, and on request of the Union, bargain in good faith over the terms and conditions of the absentee and tardiness policy.

(b) Post at its facility in Fairborn, Ohio, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally implement changes in our absentee and tardiness policy without first affording Local Lodge D-357, Cement, Lime, Gypsum and Allied Workers, Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, the opportunity to bargain in good faith over such proposed changes as the exclusive bargaining representative of our employees in the following unit:

> All production and maintenance employees at our plant and quarries located at Fairborn, Ohio, but excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the unilateral changes made in our absentee and tardiness policy on May 1, 1989, and on request of the Union, bargain in good faith over the terms and conditions of the absentee and tardiness policy.

SOUTHWESTERN PORTLAND CEMENT COMPANY